Sivajothi a/p K Suppiah v Kunathasan a/l Chelliah

HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NO 24–1876 OF 2004(4)
AZAHAR MOHAMED JC
15 JANUARY 2006

Family Law — Financial obligation — Maintenance order — Application to vary — Change of circumstances — 'Material change' — Law Reform (Marriage and Divorce) Act 1976 s 96, Divorce and Matrimonial Proceedings Rules 1980 r 63(1)

The defendant applied to the court, inter alia, to vary the maintenance order granted by the High Court dated 15 December 1999, in so far as it related to the maintenance in the sum of RM5,000 per month payable by the defendant to the children and the defendant be ordered to pay a sum of RM400 per month as maintenance for his two children with effect from 24 August 2001. The order made on 15 December 1999 was on the basis that the plaintiff had all the three children in her custody, care and control. But since 24 August 2001, the eldest daughter had been in the custody, care an control of the defendant, hence the plaintiff has one less child to maintain as of 24 August 2001. The defendant also contended that his income from his practice as an accountant has reduced significantly.

Held:

(1) It is apparent that under s 96 of the Law Reform (Marriage and Divorce) Act 1976, in so far as it relates to the case at hand, there must be a material change in the circumstance in order for the court to vary or rescind any order for maintenance. The section says any 'material change' and not simply 'change'. On a proper construction, the requirement in this section did impose a legal obligation on the defendant to prove on the balance of probability that there had been a material change in the circumstances as at 24 August 2001. There was no requirement at all for the plaintiff to disprove anything. The court found that the plaintiff no longer needed the maintenance payment in the sum of RM1,318 per month for the eldest daughter (see paras 10, 12).

(2) The defendant had failed to prove any material change in his income since the order was made. The defendant had failed to disclose his full monthly income, expenses and the market value of all his properties. He had failed to set out full particulars of his property and income within the meaning of r 63(1) of the Divorce and Matrimonial Proceedings Rules 1980 ('the 1980 Rules'). He had failed to disclose his earnings capacity and other available capital resources (see para 15).

[Bahasa Malaysia summary

Defendan memohon kepada mahkamah, antara lain, satu variasi kepada perintah nafkah yang diperintahkan oleh Mahkamah Tinggi bertarikh 15 Disember 1999, hanya berhubungan dengan jumlah nafkah RM5,000 sebulan yang patut dibayar oleh defendan kepada anak-anaknya dan bahawa defendan diperintahkan membayar jumlah RM400 sebulan terhadap nafkah kedua-dua anaknya dari tarikh 24 Ogos 2001. Perintah yang diberikan pada 15 Disember 1999 adalah atas sebab plaintif mempunyai tiga orang anak di bawah jagaan dan kawalannya. Namun semenjak 24 Ogos 2001, anak sulungnya berada di bawah jagaan dan kawalan defendan, dengan itu plaintif mempunyai kurang satu anak untuk ditanggung dari tarikh 24 Ogos 2001. Defendan juga menyatakan bahawa pendapatannya daripada pengamalannya sebagai seorang akauntan telah nyata sekali berkurangan.

Diputuskan:

(1) Ia adalah jelas dari s 96 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976, setakat mana ia berhubung dengan kes ini, mesti terdapat satu perubahan keadaan yang ketara sebelum mahkamah dapat mengubah atau membatalkan sebarang perintah untuk nafkah. Seksyen tersebut menyatakan 'perubahan yang ketara' dan bukannya 'perubahan'. Berdasarkan satu tafsiran yang betul, keperluan dalam seksyen ini mengenakan satu obligasi di sisi undang-undang ke atas defendan untuk membuktikan atas imbangan kebarangkalian bahawa terdapat perubahan yang ketara dalam keadaan setakat 24 Ogos 2001. Tiada keperluan undang-undang untuk plaintif membuktikan sebaliknya apa-apa juga. Mahkamah berpendapat plaintif tidak lagi perlu membayar RM1,318 sebulan sebagai nafkah untuk anak sulungnya (lihat perenggan 10, 12).

(2) Defendan telah gagal membuktikan sebarang perubahan yang ketara terhadap pendapatannya semenjak perintah itu diberikan. Defendan telah gagal membentangkan sepenuhnya pendapatannya sebulan, perbelanjaannya dan nilai pasaran segala hartanahnya. Beliau telah gagal membutirkan segala hartanahnya dan pendapatannya dalam maksud k 63(1) Kaedah Prosiding Penceraian dan Penyenggaraan 1980. Beliau telah gagal mendedahkan kapasiti mata pencariannya dan sumber modalnya yang sedia ada (lihat perenggan 15).]

Notes

For cases on maintenance order generally, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3120–3222.

Cases refered to

Goh Kim Hwa v Khoo Swee Huah [1986] 2 MLJ 156 (refd)
Sivajothi a/p K Suppiah v Kunathasan a/l Chelliah [2000] 6 MLJ 48 (refd)

Legislation referred to

Divorce and Matrimonial Proceedings Rules 1980 r 63(1)
Law Reform (Marriage and Divorce) Act 1976 s 96

R Thayalan (TH Liew & Partners) for the plaintiff.
Shahreen Begum (Imran,Shahreen & Co) for the defendant.

Azahar Mohamed J:

[1] This is the defendant' application in encl 98, inter alia, for the relief that the order of Faiza Tamby Chik J dated 15 December 1999, in so far as it relates to the maintenance in the sum of RM5,000 per month payable by the defendant to the children, be varied and the defendant be ordered to pay a sum of RM400 per month as maintenance for Gayithiri Kunathasan Chelliah and Meera Kunathasan Chelliah with effect from 24 August 2001.

[2] Before going any further, it is important to set out the factual background and the sequence of events relevant to this application. The matter arises in this way. The plaintiff is an accountant and the defendant is a public accountant and has his own accounting firm under the name of Chelliah & Associate in Johor Bahru. They were married at the Civil Registry of Marriages in Johor Bahru on 1 November 1987 and out of this marriage three children were born:

(1) Venothini Kunathasan Chelliah born on 7 February 1990;

(2) Gayithiri Kunathasan Chelliah born on 2 November 1993; and

(3) Meera Kunathasan Chelliah born on 24 Mac 1995.

[3] The plaintiff and the defendant have a long history of disagreements and irreconcilable differences. Sadly, the relationship came under enormous strain. It appears they distrust one another. As a result of this start of affairs, on 3 July 1997, thai is to say approximately two years after the youngest child was born, the plaintiff filed an ex parte originating summons in the Shah Alam High Court and obtained the following orders:

a) that the plaintiff be given immediate custody, care and control of her three children;

b) the defendant and/or his servants or agents or family members be restrained from taking possession, control or care of the three children from any place whatsoever;

c) the defendant and/or his servants or agents or family members be restrained from entering the plaintiff's house at anytime whatsoever;

d) the defendant and/or his servants or agents or family members be restrained from threatening, assaulting or harassing the plaintiff, the maid and/or the plaintiff's children in any manner whatsoever; and

e) the defendant is at liberty to apply to this honourable court for any variations of these orders and such application shall be heard inter partes by this honourable court.

A **[4]** But soon, the defendant took out a summons in chambers dated 30 July 1997 and prayed for the following orders:

(i) that the order of the court dated 3 July 1997 be set aside;

(ii) that the defendant be given immediate custody, care and control of Venothini Kunathasan Chelliah, Gayithiri Kunathasan Chelliah and Meera Kunathasan Chelliah; and

(iii) that the plaintiff be given reasonable access to the children.

[5] On 1 April 1998, the Shah Alam High Court dismissed with costs the defendant's application but made the following orders:

(i) that the defendant be granted weekly access to the three children namely Venothini Kunathasan Chelliah, Gayithri Kunathasan Chelliah dan Meera Kunathasan Chelliah from 3pm on Saturday to 10pm on Sunday;

(ii) the defendant be granted access to the three children for two third of the short school term holidays and the plaintiff shall have access to the three children for one third of the short school term holidays;

(iii) the defendant and the plaintiff shall each have half of the December school term holidays in respect of access to the three children; and

(iv) the plaintiff and the defendant shall arrange and confirm through their respective solicitors the place for the fetching and returning of the three children at least five days before the defendant fetches and returns the three children.

[6] Going back a little, the plaintiff filed an application dated 25 March 1998 and prayed for the following orders:

(1) that the defendant pay to the plaintiff maintenance for the three children namely Venothini Kunathasan Chelliah, Gayithri Kunathasan Chelliah dan Meera Kunathasan Chelliah from 3 March 1997 till the date of filing of the Originating Summons No MT1–24–376 of 1997 on 3 July 1997 for the sum of RM21,956;

(2) that the defendant pay to the plaintiff maintenance for the three children namely Venothini Kunathasan Chelliah, Gayithri Kunathasan Chelliah dan Meera Kunathasan Chelliah from 4 July 1997 onwards and for the future the sum RM5,489 per month; and

(3) such further or any other reliefs as this honourable court shall deem fit and proper to grant.

[7] The defendant contested all her prayers. Later on, after a full trial, Faiza Tamby Chik J granted the order for maintenance on 15 December 1999 (see *Sivajothi a/p K Suppiah v Kunathasan a/l Chelliah* [2000] 6 MLJ 48). According to the learned judge, and I respectfully agree with him, maintenance signify any form of material provision that will enable an adult to live a normal life and a child to be brought up properly. Thus maintenance cannot mean only mere subsistence, i.e the food she puts in her mouth but must also means the clothes on her back, the house in which she

lives.and the money which she has to have in her pocket, all of which vary according to the means of the man who leaves a wife behind. Moreover, it is settled law that it is the duty of the father to maintain the standard of living the children had enjoyed in the past, ie during the existence of the marriage. The following passage in the judgment of the learned judge at pp 79–80 of the report is of relevance to the present application (encl 98) before me:

> After perusing the written arguments and oral submissions in respect of provisions for maintenance made by both parties, I allow the following items of monthly maintenance for the three daughters. However, in reaching the final figure I round it up to a sum of RM15,000 per month for maintenance of the three daughters from 4 July 1997 onwards. For the maintenance of the daughters from 3 March 1997 to 3 July 1997, I allow a round figure of RM20,000. The breakdown is as follow: (Final total is rounded up to RM5,000)

(a) School/education/tuition:	
Children's school fees and other school related payments	
Venothini	RM 25.00
Gayithri	RM 280.00
Meera	RM 260.00
Pocket money for 3 children @ RM60.00	
Per child	RM 180.00
Books/accessories/story books RM50.00	
Per Child	RM 150.00
Transport coats for children to and from school	RM 300.00
Tuition for Mathematics & Bahasa Malaysia	
Venothini	RM 250.00
Gayithri	RM 150.00
Meera	RM 150.00
	RM 1,745.00
(b) Extra-curricular activities	
Vocal and dancing classes for 3 children @RM75.00per child	RM 225.00
Speech & drama (for Gayithri)	RM 60.00
Pocket money/tidbits and transport for ECA	RM 175.00
	RM 460.00
(c) Children clothing, shoe, toiletries and Toys for 3 children	RM 600.00
(d) Food, marketing, vitamins and medical For 3 children	RM 1,500.00
(e) Maid	RM 715.00
(e) House Rental	RM 1,400.00
Total	RM 6, 420.00
Less the wife's contribution is	RM 1,095.00
Final Total	**RM 5,325.00**

A The mother's summons in chambers dated 25 March 1998 is hereby allowed as amended to a round figure of RM5 000 per month.

[8] Afterward, the defendant appealed against the order made on 15 December 1999 to the Court of Appeal. On 11 January 2005, the Court of Appeal unanimously B dismissed the defendant's appeal and the order made on 15 December 1999 was upheld.

[9] Here, I should like to refer to s 96 of the Law Reform (Marriage and Divorce) Act 1976 ('the 1976 Act') which provides as follows:

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> The court may at any time and from time to time vary, or may rescind, any order for the custody or maintenance of a child on the application of any interested person, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the. circumstance.

D **[10]** The meaning of the section is plain and very clear. It is apparent that under s 96, in so far as it relates to the case at hand, there must be a material change in the circumstance in order for the court to vary or rescind any order for maintenance. The section says any 'material change' and not simply 'change'. There is no ambiguity whatsoever. It means a change in an essential part. In considering whether there has E been any 'material change' within the meaning of this section regard must be had to all the relevant circumstances, including, in the context of the present case, the judgment of Faiza Tamby Chik J. On a proper construction, the requirement in this section does impose a legal obligation on the defendant to prove on the balance of probability that there had been a material change in the circumstances as at 24 August 2001. There is no requirement at all for the plaintiff to disprove anything.

F **[11]** Now, the defendant is relying on the following grounds to support his contention that there is a material change in circumstances:

(1) since 24 August 2001 one of the child has been in the custody, care an control of the defendant in Johore Bahru;

G (2) defendant's income from his practice as an accountant has reduced significantly;

(3) none of the three children are in kindergarten anymore;

(4) plaintiff has no maid;

H (5) the children do not take the bus to go to school or other extra-curriculum activities as the plaintiff and the children has been residing in the same neighborhood with the children's school since 1998;

I **[12]** The important point to note here is that it is an undeniable fact that since 24 August 2001 the defendant has custody, care and control of the eldest daughter, Venothini Kunathasan Chelliah, who is now 15 years old. What follows thereafter is that from 24 August 2001 onwards the plaintiff had only two daughters in her custody, care and control. In this regard, more significantly the order made by Faiza Tamby Chik J on 15 December 1999 was on the basis that the plaintiff had all the

three children in her custody, care and control. This means that, if up to 23 August 2001 the plaintiff had all three children in her custody, care and control, and from 24 August 2001 onwards, she had only two children in her custody, care and control, then the plaintiff has one less child to maintain as of 24 August 2001. To me, viewed from such a standpoint, the complexion has changed significantly. The 'material change' is obvious. Therefore, I entirely agree with the arguments of learned counsel for the defendant on this point. For that reason, I am of the view there has been a material change in that respect within the meaning of s 96 of 1976 Act. That is why to reflect this part of my judgment; it is my finding that the plaintiff no longer needs the maintenance payment in the sum of RM1,318.00 per month for the eldest daughter.

[13] With regard to the defendant's contention that his income has reduced significantly, there are several problems with this point. First, I am not at all convinced that there is any material change since the learned judge decided on the matter. In this regard, I lay emphasis that Faiza Tamby Chik J granted the order for maintenance on 15 December 1999 after a full trial. The defendant has failed to prove any material change in his income since the order was made. Rule 63(1) of the Divorce and Matrimonial Proceedings Rules 1980 ('the 1980 Rules') provides:

> An application for a variation order shall be supported by an affidavit by the applicant setting out full particular of his property and income and the grounds on which the application is made.

[14] The defendant has exhibited the following documents to support his contention that his earnings has reduced significantly:

1) Financial Statements for the period 1 September 1996 to 31 August 2002;
2) Income Tax Return Form for the year 2002;
3) Notice of Assessment of Income Tax for the years 1996, 1998 to 2003.

[15] But the main problem, to my mind, is that the defendant has failed to disclose his full monthly income, expenses and the market value of all his properties. To my mind, he has failed to set out full particulars of his property and income within the meaning of r 63(1) of the 1980 Rules. He has failed to disclose his earnings capacity and other available capital resources. It appears that the defendant has used an overdraft facility for the purpose of investment in shares and properties. In this regard, the plaintiff in her affidavit, which was affirmed on 1 March 2005, inter alia, averred:

> 10. In reply paragraph 16 and exhibit KC-3 of the defendant's affidavit I state as follows:
>
> (a) The defendant has deliberately declared a low income in order to justify the payment of a very low maintenance for the children. The defendant had originally declared an income of RM100,000 for the Year of assessment 1996 and also declared his income of RM36,000 under my name for the same year. Subsequently he amended his declared income to RM70,830 in order to bolster his appeal in the Court of Appeal;
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> Copies of the defendant's letter to the Jabatan Hasil Dalam Negeri dated 2 August 2004 and the Borang J for the Year 1996 are annexed herewith and collectively marked as exhibit 'SJ-5'.

(b) The defendant's Income Statement is prepared by the defendant himself and not by and independent third party. Even then the declaration made is after, inter alia, deducting the following expenses:

(i) That all utility (water, electricity, telephone) expenses in respect of his house are paid by his Company and expensed out in his office accounts;

(ii) That books, newspapers and periodicals are paid. by his Company and expensed out in his office accounts;

(iii) That his car hire purchase instalments and interest charges are paid by the Company ad are expensed our as depreciation and interest charges in his office accounts;

(iv) The motor and travelling expenses are paid by the Company and expensed out as expenses in his office accounts.

11. In reply to paragraph 17 of the defendant's affidavit I state as follows:

(a) (a) The defendant has not disclosed and exhibited the full Bank Statements from the date the loan was first taken on the house when it was first purchased until to date. This will show the flow of funds and the purpose of the payments;

(b) (b) I verily believe that the overdraft facility was used by the defendant for his various investments, some of which may not have been disclosed by the defendant to this Honourable Court;

12. In reply to paragraph 18 of the defendant's affidavit I state that the defendant had deliberately not paid his rental for the office premises and engineered the civil suit to that he can justify that he has no means to pay the

13. Maintenance for the children that was ordered by the High Court and as affirmed and upheld by the Court of Appeal.

[16] After much thought and consideration to all aspects of this issue, I have made a decision that the defendant has failed to make a full and frank disclosure of his financial standing and obligations to enable me to make a determination whether there has been any material change in his income since the making of the order for maintenance of Faiza Tamby Chik J dated 15 December 1999. Accordingly, in my view, there has been no material change in his income within the meaning of s 96 of the 1976 Act.

[17] On the other grounds relied upon by the defendant that the children are not in kindergarten anymore, the plaintiff has no maid and the children do not take bus to go to school or other extra-curriculum activities, to my mind these are frivolous and untenable grounds. In my view, the defendant neither thought nor acted reasonably. What is most important in this connection is that although they are no longer in kindergarten they are now in primary school and naturally there will be expenses to be incurred. The principle of law is well illustrated in the case of *Goh Kim Hwa v Khoo Swee Huah* [1986] 2 MLJ 156, where Siti Norma Yaakob J (as she then was) in the course of her judgment said at p 157:

> On the issue of maintaining the two girls, the applicant had asked for $400 per month per child exclusive of all sums agreed to be expended by the respondent for their education, tuition and medical fees. I hardly expected the respondent to object to this for even if custody of the two girls had remained with him, he is expected to spend some money on

them apart from their education, tuition and medical fees. However, he claims that the amount asked for is prohibitive but as a doctor, running three clinics called Clinic Chow, Petaling Jaya Polyclinic and Jinjang Clinic, he can well afford to contribute to their maintenance. In this respect, I do not consider him to be truthful when he stated that he only earned $4,000 a month with a take home pay of only $503. He needs more than just his own bare statement to convince me that his monthly gross earning is only $4,000. As I consider the sum asked for are not unreasonable, bearing in mind that the two girls are at that stage of growing up where they need new clothes and other necessities which only money can buy, and as the amount is not prohibitive to the respondent, I had also ordered that the respondent pay the applicant $400 per month per child as their maintenance, exclusive of all sums agreed to be expended by the respondent for their education, tuition and medical fees.

[18] I would respectfully agree with the views expressed by the learned judge. In the same way, in the instant case, the children are at the stage of growing up. I would say that they certainly need new clothes and other necessities. I must add that besides this, it is the duty and responsibility of the defendant, as the natural father, to provide the children better education, medical care, tuition and extra curricular activities for their overall development, welfare and advancement, which would warrant me to vary the High Court maintenance order, which was affirmed and upheld by the Court of Appeal on 11 January 2005.

[19] To sum it up, for the reasons given, I would only vary the maintenance order of 15 December 1999 from RM5,000.00 to RM5,682.00 per month payable by the defendant with effect from 23 August 2001. There will be no order as to costs.

Order accordingly.

Reported by Sally Kee